80-334

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980
NO. 80-

MILTON SILVERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether a petition for a writ of error coram nobis states a legal basis for relief, sufficient to require an evidentiary hearing, where it alleges: (i) that a key witness at petitioner's trial had given false testimony at a prior pre-trial hearing in the same case on a matter material to that hearing and relevant and material to the prosecution and defense of the trial; and (ii) that the Government prosecutor intentionally withheld from the defense his knowledge and belief that the key witness had so perjured himself.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

80-

MILTON SILVERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For The Second Circuit

PETITION FOR CERTIORARI

MILTON SILVERMAN respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The United States District Court for

the Southern District of New York (Edmund L. Palmieri, J.) rejected petitioner's claims without an evidentiary hearing in an unreported seven-page memorandum-order entered on March 20, 1980. (App. B, pp. 1-27b.) The United States Court of Appeals for the Second Circuit affirmed the district court's order on the opinion below on June 30, 1980. (App. A, pp. 1-3a.)

JURISDICTION

On June 30, 1980, the court of appeals entered an order affirming the order of the district court on the opinion below. This Court has jurisdiction to review the judgment of the court of appeals on writ of certiorari pursuant to 28 U.S.C. §1254(1).

RULES INVOLVED

Set forth as Appendix H, pp. 1-2h, are the pertinent provisions of FED. R. EVIDENCE 404(a)(3) and 608(b).

STATEMENT OF THE CASE

Indicted in the Southern District of New York in 1968 (68 Cr. 762) on eighteen counts charging embezzlement of union funds and falsification of union books and records, in violation of Title 18, United States Code, Section 664, and Title 29, United States Code, Sections 431(c), 436, 439(b) and (c) and 501 (c), petitioner was convicted before Judge Palmieri and a jury in 1969. That conviction was in part upheld by the court of appeals at 430 F.2d 106 and 439 F.2d 1198 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971). Also upheld at that time was Judge Palmieri's denial in a written opinion dated April 30, 1968 (68 Cr. 762) of petitioner's motion for a new trial.

Judge Palmieri denied further motions and petitions brought by petitioner, with opinions dated June 22, 1971 (68 Cr. 762), March 21, 1972 (71 Civ. 4997), and May 5, 1976 (75 Civ. 4989). These determinations were

affirmed by the court of appeals at 469 F.2d 1404 (2d Cir. 1972), cert. denied, 411 U.S. 982 (1973), and 556 F.2d 655 (2d Cir.), cert. denied, 434 U.S. 956 (1977).

No hearing was ever held on any of the above-mentioned post-judgment claims.

The Instant Coram Nobis Proceeding

The factual allegations in support of the instant petition — brought pursuant to 28 U.S.C. §1651 and United States v. Morgan, 346 U.S. 502 (1954) (App. C, pp. 1-2c.) — are set forth in the affidavits of Robert E. Scher, Esq., Daniel Markewich, Esq., David I. Shivitz, Esq., Kalman V. Gallop, Esq., Max G. Sanchez and petitioner; an expurgated memorandum of Robert Scher, Esq., dated February 4, 1969; and a proferred supplemental affidavit of Robert E. Scher, Esq., which the district court did not consider.* (App. D, pp. 1-51d;

*This supplemental affidavit was included in the Second Circuit record on appeal by stipulation with the Government.

App. B, pp. 25-27b; App. G, pp. 1-4g.)

In sum, the foregoing papers demonstrate that Jacob Friedland, the Government's only rebuttal witness at petitioner's 1969 trial, was a key witness, probably the key witness, against petitioner. His testimony logically and legally bore on all counts of the indictment and was thus highly material. At a prior hearing in the same case, Friedland gave false testimony under oath on a matter material to that hearing; that perjury was highly relevant to an evaluation of this key witness' credibility at the trial. Neither petitioner nor his attorneys knew that Friedland had given false testimony; therefore, the defense was deprived of its right to cross-examine Friedland about his prior perjury in the same case. But the prosecutor did know of the falsity of Friedland's pre-trial testimony; for, a month before trial, the prosecutor informed Friedland's then attorney, Robert E. Scher, Esq., who had

entered the case subsequent to Friedland's pre-trial testimony, that the prosecutor knew and believed that Friedland had committed perjury at the prior hearing and might be indicted for that perjury, but that the prosecutor could "control" such indictment.

Naturally, Friedland's attorney did not reveal this information to petitioner or his lawyers either before or at trial or during the years thereafter. Friedland's counsel only in 1979, upon the inquiry of petitioner's new attorney about another subject, reviewed his 1969 file and, having refreshed his recollection from a contemporaneously made memorandum, spontaneously and for the first time made it known that, a decade ago, a month before petitioner's trial, the prosecutor revealed to him Friedland's perjury, the threat of indictment therefor, and the willingness to control such indictment. Although Friedland's attorney had the duty not to speak in 1969, the

prosecutor had the opposite duty: to come forward with this vital information concerning the credibility of the key Government witness. Its "high value to the defense could not have escaped the prosecutor's attention." United States v. Keogh, 391 F.2d 138 (2d Cir. 1968).

This prior perjury was not collateral, as it had occurred in the course of the same case and in connection with the same general subject matter on which Friedland's trial testimony was material. However, not only did the prosecutor "sit idly by" in violation of Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); and Taylor v. Lombard, 606 F.2d 371 (2d Cir. 1979), and not reveal the information to defense counsel or the court; here, instead, the prosecutor actually took steps which had the intent, and the effect, of insuring that the prior perjury would not come out.

In the first place, the prosecutor at trial advised defense counsel and the court that the key witness had previously been told he was a target of an indictment for obstruction of justice, but at that time the prosecutor said nothing about, and gave no hint of, the threatened indictment for perjury or the perjury itself. Secondly, in seeking immunity for Friedland, the prosecutor did not even reveal to his superiors in the Justice Department that this key witness had previously committed perjury in the same proceeding; perhaps this omission was caused by the prosecutor's expressed zeal for conviction,* and by his fear that the Attorney General would not authorize the granting of immunity to one who had already lied under oath in the very case. Thirdly, the prosecutor simply took the exped-

*The majority of the court of appeals panel, United States v. Silverman, supra, 430 F.2d at 128, criticized the prosecutor for "over-kill" at petitioner's trial.

ient way out, by so confining his examination of Friedland at trial as to insure that Friedland would not repeat his prior perjury and thereby force the prosecutor, even under his own standards, to reveal it after all. He also apparently saw to it that Friedland received transactional immunity even for the unrevealed prior perjury.

The District Court's Decision

The district court denied Silverman's petition without a hearing, primarily on the ground that the Scher memorandum "records no more than an opinion by the prosecutor, Maloney, that Friedland had lied at a pre-trial hearing" and that there was therefore no "constitutional lapse" in the Government's case. (App. B, pp. 1-27b.) Additionally, the district court strongly suggested that Silverman's prior motions rendered the current one subject to the "realm of collateral estoppel or res judicata," notwithstanding that Silverman had

never before alleged that Friedland had lied at the pre-trial hearing or that the Government had known this.

The Decision of the Court of Appeals

The court of appeals affirmed on the opinion of the district court. (App. A, pp. 1-3a.)

REASONS FOR GRANTING THE WRIT

I.

WHETHER A PROSECUTOR'S FAILURE TO DISCLOSE A KEY WITNESS' PERJURY AT A PRE-TRIAL HEARING IN THE SAME CASE IS A BASIS FOR REVERSAL IS A QUESTION OF GREAT GENERAL IMPORTANCE ON WHICH THIS COURT HAS NOT EXPLICITLY RULED AND WHICH THE COURT BELOW DECIDED IN A MANNER CONTRARY TO ITS OWN RECENT DECISIONS.

In denying Silverman's petition without even so much as a hearing, the court below apparently believed that the petition did not state a basis for relief. Indeed, the court of appeals described the petition as "totally without merit." Yet, there are statements in at least four recent Second Circuit opinions demonstrating that reversal is mandated on the

facts of this case, and this Court has suggested in several cases decided after Brady v. Maryland, 373 U.S. 83 (1963), that reversal is mandated in these circumstances. Thus, definitive guidance from this Court is in order since the Supreme Court has never explicitly ruled on the important issue of the effect of a prosecutor's intentional failure to reveal his knowledge or belief that a key witness had lied on a relevant and material issue at a pre-trial hearing in the same case.

In Brady v. Maryland, supra, this Court held, generally, that a conviction must be reversed where the prosecutor has suppressed material evidence. In Giles v. Maryland, 386 U.S. 66 (1967), a plurality of this Court held that where "[t]he credibility of the witnesses was...important to the outcome of the case," the suppression by the prosecution of evidence of which "the defense might have made effective use...at the trial" in order "to impeach a

witness' credibility" was error of constitutional dimension.

Later, in United States v. Agurs, 427 U.S. 97 (1976), this Court noted that

> "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (underscoring supplied).

The Second Circuit made the same observation in Silverman v. United States, supra, 556 F.2d at 659. This Court further held that in such cases "a strict standard of materiality" should be applied because such cases "involve a corruption of the truth-seeking function of the trial process." Apparently, this rule applies where there is "reason to question the veracity of any of the prosecution witnesses" and where the evidence that was not revealed "did...arguably give rise to any inference of perjury." In such a case, and particularly where, as here, the prosecutor actually knew and believed that the

key witness had committed perjury, there is no requirement that defense counsel have requested the materials or directed the prosecutor's attention to them; it is enough that the prosecutor knew or should have known and yet did not come forward. Here, the "high value" of this evidence to the defense "could not have escaped the prosecutor's attention." United States v. Keogh, supra.

Napue v. Illinois, supra, and Giglio v. United States, supra, both require a new trial where the prosecutor has intentionally withheld evidence or put forth false evidence that could in any reasonable likelihood have affected the judgment of the jury, and where such evidence was important and ought to have been known to the prosecutor to be important. In Giglio, this Court cited Napue for the proposition that:

> "When the 'reliability of a given witness may well be determinative of guilt or innocence' non-disclosure of evidence affecting credibility falls within this general rule."

There can be no doubt that in the instant case Friedland was such a witness.

As recently as October 1, 1979, the Second Circuit held in Taylor v. Lombard, supra at 375:

> "The requirement applies even where the perjury relates to a witness' credibility rather than bearing directly on the defendant's guilt:
>
> > "'A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth...'
>
> Napue v. Illinois, supra at 269-70."

Undoubtedly, this Court, unlike the court below, will apply the same standards to federal as to state prosecutors. A new trial is required, as in the instant case, where "there was any reasonable likelihood" that the failure to reveal the perjury "affected the fairness of the defendant's trial."

Napue, Giglio and Taylor differ from the

instant case in that there the prosecutor had failed to correct a witness' false statement at trial, whereas here the perjury was committed at a prior stage of the same proceeding and not repeated at trial. Yet the instant case resembles Napue and Giglio in that the prosecution failed to advise the defendant and the court that the witness had been threatened with a perjury indictment if he did not cooperate and told it could be controlled if he did. Moreover, the hearing and trial testimoney of this key witness was highly material, and revelation of his prior perjury in the same case was highly relevant to a determination of Friedland's credibility and thus to the final outcome of the trial. Even before Fed. R. Evidence 404(a)(3) and 608(b), the Second Circuit under its then more restrictive practice permitted an attack on the credibility of a key witness by showing his "propensity to disregard the obligation of an oath." United

States v. Provoo, 215 F.2d 531, 537 (2d Cir. 1954); United States v. Tomaiolo, 249 F.2d 683, 689 (2d Cir. 1957). No perjury conviction was required as a predicate for cross-examination.

There are statements in at least four post-1969 Second Circuit opinions demonstrating that the rule of Napue, Giglio and Taylor should apply to the instant case and mandate a new trial. In United States v. DeSapio, 456 F.2d 644 (2d Cir.), cert. denied, 406 U.S. 933 (1972), the court refused to grant a new trial notwithstanding that Itkin had committed perjury on many prior occasions and that the Government had withheld this information from DeSapio's attorney. In footnote 2 at page 648, the court held that in DeSapio the defendant could not rely upon Napue because in Napue the Government "either knew or suspected that one of its principal witnesses had committed perjury in the case on trial." The italics are the court's.

The court continued to note in the footnote that, to the contrary in the DeSapio case, Itkin was there lying to protect his cover; thus, his prior perjury "established no basis from which it may be inferred that Itkin perjured himself in this case." The court added that there was no evidence that Itkin had perjured himself at any time after 1968, when DeSapio was indicted. To the contrary in the instant prosecution, Friedland's perjury took place "in the case on trial" and after indictment of petitioner. Thus the DeSapio case supports the proposition that, where the prosecutor "suspects" perjury by a key witness, his wilful failure to disclose that perjury committed in the very "case on trial" (i.e., "in this case," not necessarily during the trial itself) will require a reversal.

The court's entire footnote 2 in DeSapio follows:

> "Appellant cannot reasonably rely upon Napue v. Illinois [supra] and Mesarosh v. United States,

> 352 U. S. 1...(1956). In those cases the government either knew or suspected that one of its principal witnesses had committed perjury in the case on trial." (First emphasis added; second emphasis as in original.)

Since Napue was indisputably a "knowledge" case, the court must have been referring to Mesarosh in measuring what standard of "suspicion" requires revelation or a new trial. In Mesarosh, supra at 4, although it remained the Government's position that the witness' trial testimony "was entirely truthful and credible," the Government was required to reveal its "suspicion" where there was "serious reason to doubt the truthfulness" of that testimony. And see United States v. Agurs, supra at 104 and 114:

> "Since this case involves no misconduct, and since there is no reason to question the veracity of any of the prosecution witnesses, the test of materiality followed in the Mooney line of cases is not necessarily applicable to this case....
>
> "[T]he arrest record...did not even arguably give rise to any inference of perjury...." (Emphases added.)

The petitioner's affidavits, and Scher's memorandum below, in the instant case certainly satisfy the "knowledge" requirements of Agurs, Mesarosh and DeSapio. First, Scher swears in 1979, and wrote in 1969,* that Maloney told him

*The Scher memorandum, as expurgated by the court, contains the following statements:

> "Maloney [the prosecutor] has a theory that Judge Murphy's order will be no bar to the testimony of Friedlan[d], because Friedlan[d] lied during the hearing on the motion to suppress....
>
> "Maloney's argument is that in specifically denying the existence of a report for Local 1614, Friedlan[d] exposed himself to a charge of perjury. Maloney suggested that he has such a report, or will have it shortly through informants. He wants to trade a possible perjury indictment for the testimony of Friedlan[d].
>
> "As a hypothetical question, I asked Maloney what would happen if Friedlan[d] did cooperate and recant it before Judge Palmieri. What would prevent...Palmieri from insisting that a prosecution take place, or insist that the Bar Association be notified that Friedlan[d] committed a fraud on Judge Murphy and should be punished. Murphy [Maloney] admitted that there is no answer to this question and that while he can control a perjury indictment, he obviously has nothing to do with Judge Palmieri's decisions."
> (Emphases added.)

that Friedland lied during the 1968 hearing; that is not a mere "suspicion" at all. Maloney also told Scher that Friedland had exposed himself to a perjury charge by denying the existence of a report to Local 1614. Maloney suggested to Scher that Maloney had or shortly would have the Local 1614 report. The seriousness and depth of Maloney's actual knowledge and belief that Friedland had actually committed perjury are demonstrated by his offer to "trade" and "control" a possible perjury indictment in exchange for Friedland's testimony. After all, "knowledge" and "belief," being states of mind, are often best demonstrated by what a person does in support thereof, such as threatening or offering to control an indictment.

In United States v. Rosner, 516 F.2d 269 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976), the Court refused to grant a new trial where, at the trial, a Government witness had lied in describing the extent of his own prior

criminal activites that were collateral to the prosecutor's case and the defense thereof and the Government was charged with knowledge of the witness' perjury as to those collateral matters. What is noteworthy is the court's observation that:

> "Leuci's admitted perjury related to his own misconduct, independent of the circumstances of this case, and not to any element of the substantive offenses with which Rosner was charged."

Thus, the Rosner opinion supports the proposition that when, as here, the Government knows that a witness is committing or has committed perjury in the course of a criminal proceeding that bears directly upon the circumstances of the case or any element of the substantive offenses, the Government must reveal that perjury upon pain of reversal. The affidavits below demonstrate that both Friedland's testimony at the pre-trial hearing (and the falsity thereof) and his testimony at the trial bore generally on the circumstances of the case and on the same

subject matter, and were relevant and material to elements of both the embezzlement and the false record-keeping counts of the indictment as well as to Friedland's credibility — in short, upon all counts. Thus, Rosner here mandated a reversal.

The Second Circuit in United States v. Pacelli, 491 F.2d 1108 (2d Cir.), cert. denied, 419 U. S. 826 (1974), actually reversed a conviction under circumstances virtually identical to the instant case. In that case, the court first held that it was proper for the defense to cross-examine a Government witness about his perjury (for which he had not been indicted or convicted) committed in a prior trial of the same action. More importantly, the Court reversed the conviction because of the Government's failure to disclose a letter in which the witness had falsely stated that his prior perjury had been unintentional. There is no material difference between Pacelli and the instant case.

United States v. Provenzano, 615 F.2d 37 (2d Cir. 1980) is clearly favorable to the petitioner's claim. The legal distinction between the facts in the instant case and those in Provenzano is exactly that set forth in footnote 24 thereof:

> "The instant case [Provenzano in the Southern District] is readily distinguishable from the later racketeering trial of Provenzano in the District of New Jersey. In the New Jersey trial, Provenzano did use some of the undisclosed impeachment material to cross-examine Picardo. But Picardo was a central witness in that case. His testimony was not limited [to voice identification] as it was here."

Moreover, there was no cross-examination of Picardo at all in the Southern District Trial.

The court in Provenzano made it "clear that our decision on the Brady issue here turns on the unique facts of this case.

> We recognize that courts should not lightly infer that undisclosed Brady material would not have been used by the defense."

In the instant case, petitioner's trial attorney has sworn that he would have sought to impeach Friedland's credibility with the information

that the prosecutor withheld, and that in his belief the impeachment might have affected the outcome of the trial. Thus, Provenzano supports petitioner's right to a new trial.

Since it would appear that, pursuant to the rule of DeSapio, supra; Pacelli, supra; and Rosner, supra; when applied to Agurs, supra; Mesarosh, supra; Giglio, supra; Taylor, supra; Giles, supra; Provoo, supra; Tomaiolo, supra; and Provenzano, supra, petitioner is entitled to a new trial if the allegations in his petition are true and had a reasonable likelihood of affecting the outcome of the trial, and since the decision below departed so dramatically from the rule of these cases by denying petitioner's claims even without an evidentiary hearing, plenary review by this Court is appropriate. A definitive rule should be enunciated as to whether a prosecutor's failure to disclose a witness' pre-trial perjury in the same case warrants relief, and, if so, under what circumstances.

II.

THE DENIAL OF SILVERMAN'S PETITION WITHOUT AN EVIDENTIARY HEARING WAS GROSSLY IMPROPER AND SHOULD BE CORRECTED BY A DIRECTIVE FROM THIS COURT THAT PETITIONS WHICH STATE A BASIS FOR RELIEF BE ACCORDED, AT THE LEAST, AN EVIDENTIARY HEARING.

The rule on a motion for postconviction relief is, simply stated, that if the allegations contained in the motion would entitle the petitioner to a new trial if proven true, a hearing must be held. Machibroda v. United States, 368 U.S. 487, 496 (1962); Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974); DeVincent v. United States, 602 F.2d 1006, 1009 (1st Cir. 1979). Indeed the Second Circuit has

> "taken a dim view of any summary rejection of a petition for post-conviction relief when supported by a sufficient affidavit."

Dalli, supra at 760; United States v. Tribote, 297 F.2d 598, 603-604 (2d Cir. 1961). None of the exceptional circumstances which courts rely on to deny a hearing on a motion which, if factually sustained, would entitle the petitioner to relief are applicable to the instant motion.

The most common basis for such a summary denial is that the supporting affidavits are so vague, conclusory, or otherwise inadequate that they cannot support the motion. United States v. Franzese, 525 F.2d 27 (2d Cir. 1975), cert. denied, 424 U.S. 921 (1976). A fair reading of the moving affidavits in the instant case, however, makes it clear that they are "detailed and specific." Machibroda, supra at 495. They demonstrate that Maloney told Scher that Friedland lied during the 1968 hearing, and that Maloney threatened, and indicated he could "control," a perjury indictment. It is simply not true, as Judge Palmieri stated in his decision, that the moving papers record "no more than an opinion by the prosecutor." Prosecutors do not ordinarily "threaten" or offer to "control" indictments which are based on only their "opinion" or "suspicion."

Nor is it fair to say, as the district court said in ruling on petitioner's motion, that the instant motion is frivolous on its face.

Petitioner has, since the resolution of his last motion, come upon new evidence in the form of Scher's statement and memorandum. A court may not assume, without a hearing, that a petitioner has acquired no new or additional information since the time of his trial or postconviction motion. Price v. Johnson, 334 U.S. 266, 290-291 (1948).

Furthermore, petitioner was never accorded a hearing on any of his prior motions. Dalli v. United States, supra at 761. Judge Palmieri's denial of the instant motion without a hearing, on the grounds that it was brought "[d]espite three previous unsuccessful attempts seeking a vacatur" and "[n]otwithstanding the significance of [the prior] rulings," was, therefore, in light of the newly discovered evidence, improper. Sanders v. United States, 373 U.S. 1, 15 (1963). This is all the more so because the Scher memorandum could not have been uncovered previously by due diligence; indeed, it was only an accident that it was ever brought to light. More-

over, the "extraordinary malfeasance" alleged is not "specifically and convincingly answered by the affidavit of the public official accused." United States v. Catalano, 281 F.2d 184, 185 (2d Cir. 1960). For there is no relevant affidavit from Maloney to contradict Scher.

Finally, a judge may deny a postconviction motion without a hearing if his personal knowledge or recollection of events that occurred in his presence conclusively negates the factual predicates asserted in the motion. Friedman v. United States, 558 F.2d 1010, 1015 n. 7 (5th Cir. 1979). But the key event relied on in petitioner's motion occurred in the presence of only Maloney and Scher. Judge Palmieri's knowledge of the case is thus of no relevance.

The only conceivable basis, then, for a denial without a hearing would have been that the facts alleged, even if proven true, would not have entitled petitioner to a new trial. The district court did not, however, even consider this basis. It simply denigrated the sufficiency of Scher's

affidavit and memorandum, refused to consider Scher's second affidavit, thereby read the facts as not having changed since petitioner's prior motion, and concluded without legal citation in support that "These circumstances can, by no stretch of the imagination, constitute a constitutional lapse in the government's case."

The error of this ruling is only compounded by the fact that an issue of credibility can rarely be resolved without the benefit of an evidentiary hearing. Raines v. United States, 423 F.2d 526 (4th Cir. 1970). This Court should therefore grant certiorari and remand for an evidentiary hearing below.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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GARY BROWN
Of Counsel

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of June one thousand nine hundred and eighty.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Present: Hon. William H. Mulligan
Hon. Thomas J. Meskill
Hon. James S. Holden*

Circuit Judges,

MILTON SILVERMAN,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

STAMP OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT JUNE 30, 1980

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below of the Hon. Edmund L. Palimeri, 68 Cr. 762 (S.D.N.Y. Mar. 20, 1980). In the instant case, Silverman brings his fourth collateral attack on his conviction for embezzlement of union funds and falsification of union books and records, in violation of 18 U.S.C. § 664 and 29 U.S.C. §§ 431(c), 436, 439(b)(c) and 501(c). We find that the issues raised here by appellant are totally without merit and that Judge Palmieri's denial of Silverman's motion for a writ of error coram

nobis without a hearing was entirely proper.

/s/ William H. Mulligan
William H. Mulligan

/s/ Thomas J. Meskill
Thomas J. Meskill
Circuit Judges

/s/ James S. Holden
James S. Holden
District Judge

*United States District Judge for the District of Vermont, sitting by designation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILTON SILVERMAN,	:	
Petitioner,	:	68 Cr. 762 (ELP)
- Against -	:	
UNITED STATES OF AMERICA,	:	OPINION
Respondent.	:	

PALMIERI, J.

Despite three previous unsuccessful attempts seeking a vacatur of the conviction and a new trial, the petitioner, Milton Silverman, now makes a fourth collateral attack on his conviction in 1969 for embezzlement of union funds and falsification of union books and records. The merits of petitioner's claims of error at his nine-day jury trial and in the denial of his first motion for a new trial (opinion dated April 30, 1969 (68 Cr. 762)) were thoroughly examined by the court of appeals. United

States v. Silverman, 430 F.2d 106 (2nd Cir. 1970).[1] Certiorari was denied by the Supreme Court on May 31, 1971. Silverman v. United States, 402 U.S. 953 (1971). A rehearing of that denial was also denied. 403 U.S. 925 (1971). Three times since then this court has been compelled to rule on similar motions or petitions. It did so in each instance with opinions dated June 22, 1971 (68 Cr. 762), March 21, 1972 (71 Civ. 4997) and May 5, 1976 (75 Civ. 4989). The court of appeals' first post-appeal decision rejecting Silverman's claims was made in open court following oral arguments. United States v. Silverman, 469 F.2d 1404 (2nd Cir. 1972), cert. denied, Silverman v. United States, 93 S.Ct. 2271 (1973). The second post-appeal decision was contained in a four-page opinion by Judge Wyzanski. Silverman v. United States, 556 F.2d 655 (2nd Cir.), cert. denied, 434 U.S. 956 (1977). In none of Silverman's post-trial proceedings was

an evidentiary hearing deemed necessary, although his post-conviction motions and petitions, including this one, have all contained the strident language of a much abused innocent. The succession of lawyers assisting him have nearly all had an imperfect knowledge of the trial record - a fact which may have motivated Judge Wyzanski in writing:

> We cannot close this opinion without commenting upon the unnecessary waste of judicial time in the District Court and in this Court in being faced with what is a manifestly frivolous petition and a manifestly frivolous appeal.
>
> We recognize the cardinal importance that no person should be convicted upon the basis of perjury. We wholeheartedly support the rule that it is a denial of the due process guaranteed by the Fifth Amendment for a person to be convicted on the basis of testimony known to the Government to be perjurious. But this was not by any stretch of the imagination an instance where the rule could be appropriately invoked. Silverman v. United States, 556 F.2d at 659.

The opinion of Judge Wyzanski is of special interest in connection with the

petition presently before this court, because Silverman's claim remains the same - that Jacob Friedland,[2] a lawyer who represented him and his union before the trial, gave perjurious testimony that was knowingly used by the Government. Judge Wyzanski had this to say about this contention:

> With respect to Silverman's claim that the Government knowingly used the perjurious testimony of Friedland and supressed information it had about him, we can only stand aghast at the effrontery of Silverman's contention. There is not a shred of evidence that the Government had from Friedland or from any other source admissible evidence or even a lead that showed that he had made the false entries in the minute book. No doubt, the prosecutor had his suspicions. But a person who did know the full role of Friedland was Silverman himself. It is fairly inferrable that he at the least acquiesced in an alteration made by Friedland.
>
> Moreover, Silverman's counsel at the criminal trial deliberately, as a matter of trial tactics, did not seek to show and, for obvious reasons, would not have wanted to show, that Friedland himself altered the minutes. Any such revelation

> of falsification by the attorney would have been attributed by the jury, in all probability, to the client who retained him. In any event, the tactical decision made at the criminal trial precludes Silverman from relying on his Chutzpadich contention that he has new evidence of his attorney's falsifications. Meyers v. United States, 446 F.2d 37 (2nd Cir., 1971). Silverman v. United States, 556 F.2d at 658.

Notwithstanding the significance of these rulings which would appear to consign the issue to the realms of collateral estoppel or res judicata, Silverman refuses to be discouraged. He now puts forward the contention that the knowing use of Friedland's alleged perjury occurred, not at the trial, as he previously contended, but at a phase of the proceedings before the trial.[3] This contention is made on the basis of an eleven-year old memorandum recently disinterred from the closed files of an attorney, Robert Scher, who assertedly dictated it on February 4, 1969, three days after being retained by

Friedland during the Grand Jury proceedings. Scher first represented Friedland during a bitterly contested motion to quash a Grand Jury subpoena seeking the production of the records of two Locals under Silverman's control. Scher then represented Friedland at the trial in March, 1969, when the Government sought to obtain his testimony. Friedland was himself retained by Silverman in the course of the Government's Grand Jury investigation and asserted throughout the pretrial and trial proceedings that he had represented Silverman as well as Silverman's union. Silverman had separate defense counsel at the trial. There was a close working relationship among all these attorneys at the trial. It was singularly apparent at the extended in camera hearings when Friedland unsuccessfully invoked his attorney-client privilege, and thereupon, when directed to testify, successfully

claimed protection under the Fifth Amendment. Mr. Shivitz, counsel for the unions, Mr. Gallop, one of the defense counsel for Silverman at the trial, as well as Mr. Scher, who acted as Friedland's personal counsel, frequently conferred together at the trial, and all of them sought to forestall Friedland's testimony and sustain his claims of privilege.[4]

THE SCHER MEMORANDUM

Basic to petitioner's position in these proceedings is the Scher memorandum of February 4, 1969. It is reproduced in an appendix attached hereto and marked "Copy Expurgated by Court." Because Mr. Scher claimed that parts of it were protected by his attorney-client privilege, this court reviewed the document when it was produced at the request of the United States Attorney, and eliminated only two

brief passages on page two of the memorandum and permitted disclosure of other parts claimed by Mr. Scher to be privileged. The original has been deposited with the Clerk of the Court under seal and is available for court scrutiny. Mr. Scher has also submitted an affidavit which is, in effect, a redacted version of his memorandum of 1969, without the misspellings and confused identities of the 1969 memorandum. Mr. Scher avers that when Silverman's "new attorney" sought him out in 1979 he "agreed to get my Friedland file out of dead storage" and having refreshed his recollection, he was able to state that Assistant U.S. Attorney Maloney had asserted Friedland had lied during the pretrial hearing on a motion to quash a Grand Jury subpoena duces tecum. This alleged assertion of the Government prosecutor Maloney, a statement that could be readily construed to be a personal

assessment by Maloney of Friedland's credibility, has here been escalated into a contention that Silverman was convicted through the Government's knowing use of false testimony at the pretrial hearing. The high sounding rhetoric and impressive but inapplicable citations going back to Napue v. Illinois, 360 U.S. 264 (1959) upon which Silverman relies stem from this contention.

The Scher memorandum is thus Silverman's piece de resistance. It was apparently dictated in a hurry and probably typed in desultory fashion. It does not appear ever to have been reviewed or corrected before it was filed. Both Friedland's name, and Maloney's are misspelled. In the sixth paragraph on page one the remark that "he can control a perjury indictment" was attributed to Murphy, not to Maloney. It was made in answer to a "hyperthetical" [sic] question by Scher of

Maloney. Additionally, and in the same paragraph, Murphy is again mentioned, although the allusion was apparently to Maloney. Even accepting the paraphrasing and textual departures set forth by Scher's affidavit, what the Scher memorandum boils down to is an expression of Maloney's dim view of Friedland's credibility and a final statement of position by Scher that Friedland would not testify voluntarily but would assert his legal privileges. This is precisely what ensued so that the last paragraph of the Scher memorandum was no more than a forecast of the trial scenario. Scher's affidavit, sworn to eleven years later, clearly supports this in stating that his ". . . sole interest was in protecting FRIEDLAND's rights by avoiding his testimony altogether if possible and, if not, by obtaining immunity from prosecution and preventing professional discipline."

Although the petitioner's papers clearly imply a "deal," there is no evidence that Scher or Friedland ever had any understanding with Maloney concerning Friedland's possible testimony. Indeed, upon the argument before this court, Silverman's attorney explicitly withdrew any claim that there was one. Additionally, despite Silverman's suggestion in his papers that there is something wrong in the Government's failure to submit an affidavit by prosecutor Maloney in these proceedings, there is on record an affidavit by Maloney, submitted to this court in the 1976 proceedings, in which Maloney makes it quite clear that he did not know what Friedland's testimony would be, even after immunity was granted.[5] This is quite apparent from the trial record as well. Moreover, the pretrial conference between Scher and Maloney dealt with a matter which occurred prior to trial and which never became a factual issue at trial.

Additionally, and fairly read, the Scher memorandum records no more than an opinion by the prosecutor, Maloney, that Friedland had lied at a pretrial hearing. These circumstances can, by no stretch of the imagination, constitute a constitutional lapse in the Government's case. As Judge Wyzanski said:

> No doubt the prosecutor had his suspicions. But a person who did know the full role of Friedland was Silverman himself. Silverman v. United States, 556 F.2d at 658.

This was not only a plain truth when it was written, it remains true today, notwithstanding the artful attempt to make the Scher memorandum sound otherwise. The court rejects the contention implicit in the motion before it that the Scher memorandum has suddenly sprung to life to reveal a long-hidden truth.

CONCLUSION

It is a lamentable state of affairs in the overburdened federal courts that repetitive proceedings of this kind can be brought without hindrance, entailing as they do a serious waste of judicial resources with all that implies by way of expense, as well as prejudice to other litigants waiting to be heard. The defendant here, convicted after a jury trial eleven years ago, after numerous unsuccessful appeals and collateral attacks, again seeks to vacate his conviction by attempting to undermine the evidence adduced by the Government at his trial. In this instance he is repeating an effort to undermine the evidence provided by the testimony of the same witness. As Judge Gagliardi of this court had occasion to point out in a recent opinion in Wolfson v. United States, 66 Civ. 720 (LPG), (S.D.N.Y., filed February 20, 1980):

> Were this a habeas petition, the court would have recourse to a provision in 28 U.S.C. § 2254 (and 28 U.S.C. § 2255), which reads:
>
> > (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of writ.
>
> Rules Governing § 2254 Cases, Rule 9. The court is not aware of an analogous provision in 28 U.S.C. § 1651 authorizing the dismissal of a petition which the court considers to be an abuse of the writ of error coram nobis.

These continuous and baseless petitions constitute an abuse of process which may well deserve appropriate sanctions. See Der-Rong Chour v. Immigration and Naturalization Service, 578 F.2d 464, 468-469 (2d Cir. 1978), cert. denied, 440 U.S. 980 (1979). See also, Lowenschuss v. Bludhorn, Nos. 79-7566, 78-7267 (2d Cir. January 9, 1980),

slip op. at 871.

The motion is denied in all respects.

It is so ordered.

/s/ Edmund L. Palmieri
Edmund L. Palmieri
U.S.D.J.

Copies have been mailed to counsel of record

Dated: New York, New York
March 20, 1980

FOOTNOTES

1. The conviction was affirmed with respect to eight counts (namely, counts 9 through 15 and count 18) and was reversed by a split court with respect to the first eight counts. While this disposition reduced the total fines from $16,000 to $8,000, the eight-month prison sentence remained unimpaired. A detailed statement of the facts relevant to Silverman's prosecution are set forth in this opinion and what follows assumes a familiarity therewith.

2. Friedland, presently under indictment in another jurisdiction, was a reluctant witness at the trial in 1969. When called to the witness stand on the Government's direct case, he successfully invoked his rights under the Fifth Amendment after an unsuccessful attempt to assert an attorney-client privilege. His testimony was obtained by the Government only in time for its rebuttal case and when it was able to give him immunity from prosecution under 18 U.S.C. §§ 2514 and 2516 (1) (b).

3. In addition to the motion under consideration, Silverman has also moved for disqualification of the court, a motion that was denied at the outset of the hearing on February 27, 1980. The ruling on the motion is reproduced in the appendix.

4. The partisanship of this array of legal talent and the pro-Silverman stance they adopted at the trial, and continue to pursue in these proceedings, can best be exemplified by a colloquy between Mr. Shivitz and the trial court. This occurred when Mr. Shivitz vigorously resisted

the production of a report made by Friedland to one of the unions after examining their records. This report was of considerable probative value to the Government's case and was discussed at some length by the court of appeals. (430 F.2d 106, 120-22). That court held that the report constituted proof of the fabrication of the union minute books and that, along with other evidence, it permitted the jury to determine that Silverman was responsible for their alteration after they were returned from Friedland and before they were surrendered to the Grand Jury investigation. The following is excerpted from the minutes of the Silverman trial when Friedland was called to the witness stand by the Government:

Friedland Direct

THE COURT: I would like to show him this report to make sure he knows what we are talking about.

MR. SHIVITZ: That is up to counsel to establish, to find out from the witness' own recollection as to whether he recalls the report. He testified to it in May before Judge Murphy. Counsel was present at the time.

THE COURT: May I have the report, please?

MR. SHIVITZ: If your Honor please, the report is under seal.

THE COURT: Whose seal?

MR. SHIVITZ: I have sealed the report and I would like not to take it from the seal and I would like not to furnish

it at this time because I feel there is no demonstration that there is a need for it.

THE COURT: There is no sanctity to your seal. I am asking you to turn over that report to me.

MR. SHIVITZ: For what purpose?

THE COURT: For appropriate use in conducting these judicial proceedings.

MR. SHIVITZ: I'm afraid, if your Honor please, that at this point I must respectfully resist the Court's request and I would like to furnish this support of my position, the determination of the Court of Appeals.

I do this with the utmost respect, Judge, please understand my position here; I represent a client. I feel that there has been no demonstration, firstly that there is no need for this --

THE COURT: I can't understand your objection to passing the attorney's own paper to him for the purpose of furnishing a basis for an appropriate question. I am not looking at it. This is his own memorandum and I cannot understand why you want to keep it confidential from the author himself.

MR. SHIVITZ: With the understanding it is going to be returned to me from this author without waiving any of the arguments --

THE COURT: You are waiving nothing since you are doing it under my direction. I can't undertake an understanding with

you at this time. I don't know what is in it and I don't know what he's going to say. It depends on the course of the proceeding.

May I have that document? I want it marked as an exhibit without looking at it at this time.

Mark it as a Court Exhibit for identification.

(Court Exhibit 6 marked for identification.)

Transcript - United States v. Silverman, 68 Cr. 762, March 10, 1969, pp. 471-73.

5. At the time of the hearing the court deplored the absence of an affidavit from Mr. Maloney, failing to recollect at the time that there was indeed an affidavit from Mr. Maloney, submitted in the 1976 proceedings.

APPENDIX

The court's ruling on Silverman's motion for recusal made part of the record of the hearing of February 27, 1980 is reproduced below. The motion for disqualification, pursuant to 28 United States Code, Sections 144 and 455 or for voluntary withdrawal is denied.

Mr. Silverman's affidavit and whatever papers have been submitted in support of this motion are insufficient to warrant a disqualification. Taking the facts alleged to be true, the alleged bias or prejudice has its source only in prior judicial proceedings or in rulings that I have made pursuant to my duty as a judge of this court; United States v. Grinnell Corp., 384 U.S. 563, (1963); In Re International Business Machines Corp., No. 79-3070 (2d Circuit, February 22, 1980.)

In its very recent IBM opinion, the Second Circuit clarified this Circuit's standards for disqualification. It is clear that Sections 144 and 455(b) are in pari materia and necessitate a showing of personal bias or prejudice that is extra-judicial in nature as distinguished from conduct within the judicial context.

Furthermore, although the court noted its earlier dictum that in-court rulings may be relevant to establish prejudice under 455(a), the court stated at pages nine to ten, and I quote:

> However, we cannot agree that adverse rulings by a judge can, per se, create the appearance of bias under Section 455(a). A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest. As Mr. Justice Frankfurter noted in Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (Frankfurter, J. concurring),

> "A timid judge, like a biased judge, is intrinsically a lawless judge." We conclude that under Section 455(a), the bias to be established must be extrajudicial and not based upon in-court rulings.

I end the quote from the IBM opinion.

I am puzzled and disturbed by the statement in the reply brief of Silverman that:

> There is such a thing as knowing too much about a case and it is that knowledge by this Court -- rather than the facts or the law -- that the Government here relies on as its best hope that the Court will not order a new trial. As defense counsel expected, the claim is "Wolf! Wolf!" once too often in an effort to avoid this Court's perception of the real merits of the instant motion.

I suggest that nothing could be further from the truth or more alien to the standards of recusal enunciated by the Second Circuit.

Any reassignment of the pending motion would result in a significant and needless waste of judicial resources.

In affirming the existence of a timeliness requirement as a requisite for a recusal motion under Section 455 of Title 28 of the United States Code, even though none is expressly set forth in the statute, the court of appeals said in its recent IBM decision, and I quote from Page 18:

> A major practical reason for the timeliness requirement is that the granting of a motion to recuse necessarily results in a waste of the judicial resources which have been invested in this proceeding.

I might add parenthetically that this case has been a cross I have had to bear for almost eleven years after a full and complete examination of the alleged merits of the trial errors by the court of appeals. It was affirmed by the court of appeals with some modifications that had to do with the fines imposed. The prison sentence was not disturbed. There have been four collateral attacks, this is the fourth, on

that decision during the past ten years. None of them has succeeded. Now we have a new one.

Under the current standards for disqualification in this circuit, I can find no basis for the validity of a charge of bias or prejudice at any time in this proceeding.

COURT EX.

2 - 2/27/80

February 4, 1969 COPY EXPURGATED BY THE COURT 2/20/80

Unsealed

MEMO FOR THE FILES
U.S. and Jacob Friedland
(1515)

Conference February 3, 1969 between RES and Andrew Malloney from 3 to 3:45 p.m.

In response to a question, I assured Malloney that we were representing Friedlan and not Milton Silverman. In the past, several attorneys have ostensibly represented Friedlan, and then asked to withdraw because of a conflict of interest.

Malloney has a theory that Judge Murphy's order will be no bar to the testimony of Friedlan, because Friedlan lied during the hearing on the motion to suppress, and in fact did give criminal advice to his clients, thus making it improper for them to claim the privilege.

I informed Maloney that there was no chance of Friedlan testifying before the Grand Jury, and Maloney agreed not to waste either of our time.

Maloney's argument is that in specifically denying the existence of a report for Local 1614, Friedlan exposed himself to a charge of perjury. Maloney suggested

that he has such a report, or will have it shortly through informants. He wants to trade a possible perjury indictment for the testimony of Friedlan.

As a hyperthetical question, I asked Maloney what would happen if Friedlan did cooperate, and recant it before Judge Palmieri. What would prevent a stickler for propriety such as Palmieri from insisting that a prosecution take place, or insist that the Bar Association be notified that Friedlan committed a fraud on Judge Murphy and should be punished. Murphy admitted that there is no answer to this question and that while he can control a perjury indictment, he obviously has nothing to do with Judge Palmieri's decisions. I think that Murphy understands that under the circumstances, no cooperation could be had from Friedlan.

Maloney's point is that he does not want to go to trial because he does not want to reveal the identity of informers, but that if he is forced to go to trial, he will do so. He wants me to use Friedlan to put pressure on Silverman, and I indicated that having no relationship with Silverman whatsoever, the matter was not in my hands, but that I would act as a conduit to see that the information and suggestions were brought to the attention of our client.

On the issue of accepting a subpoena for Friedlan, I begged off, explaining that we had been in the case for three days, and I could not very well deprive Friedlan of his right to personal service.

Maloney asked that I advise him in advance of February 17th, if Friedlan has any intention of cooperating.

* * *

February 4th, I relayed the information to Maloney that I would accept the subpoena; that there had been no report made out for Local 16 14

* * *

and that the witness would not testify voluntarily but would claim his various privileges. I requested Maloney to inform me when he knows, on the exact date when the attendance of Friedlan would be required. This he agreed.

UNITES STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against-

MILTON SILVERMAN,

Defendant.

- - - - - - - - - - - - - - - - - - - -x

NOTICE OF MOTION FOR WRIT OF ERROR CORAM NOBIS AND DISQUALIFICATION OR WITHDRAWAL OF JUDGE

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affidavits and exhibits and upon all the papers and proceedings heretofore had herein and in connection therewith, a motion will be made on the 4th day of December, 1979, before this Court, at Room 2003, United States Courthouse, Foley Square, New York, New York, at 2:30 o'clock in the afternoon or as soon thereafter as counsel can be heard, for a

writ of error coram nobis pursuant to 28 U.S. Code §1651, United States v. Morgan, 346 U.S. 502 (1954) and other case law, and for a hearing on the said motion, and for vacatur of the conviction herein, and for a new trial, on the ground of prosecutorial misconduct in the suppression of evidence relevant and material to the case and favorable to the accused, and for disqualification or withdrawal of HON. EDMUND L. PALMIERI, the Trial Judge herein, from all further consideration of these proceedings.

Dated: New York, New York
October 31, 1979

Yours, etc.,

MARKEWICH ROSENHAUS MARKEWICH
& FRIEDMAN, P.C.
Attorneys for Defendant

By: /s/ Daniel Markewich
Daniel Markewich
A Member of the Firm
Office & P. O. Address
350 Fifth Avenue
New York, New York 10001
563-3500

TO:
HON. ROBERT B. FISKE, JR.
United States Attorney
1 St. Andrew's Plaza
New York, New York 10007

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against-

MILTON SILVERMAN,

68 Cr. 762
(ELP)

Defendant.

- - - - - - - - - - - - - - - - - -x

AFFIDAVIT IN SUPPORT OF MOTION
FOR WRIT OF ERROR CORAM NOBIS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT E. SCHER, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York, having been admitted in 1958. I am also a member of the Bar of this Court and of the Second Circuit Court of Appeals, having been admitted in 1960. I was bailiff-law clerk to HON. ARCHIE O. DAWSON of this Court from 1956 to 1958, and an Assistant United States Attorney in this District from 1958 to 1961. I was

for many years a member of the firm of RAPHAEL, SEARLES, VISCHI, SCHER, GLOVER & D'ELIA, and am now in private practice with MR. SEARLES.

2. Early in the year 1969, I was retained to represent an attorney named JACOB FRIEDLAND, whose cooperation as a Government witness had been sought in the forthcoming prosecution of MILTON SILVERMAN. In this connection, I was present, by myself, at a conference with Assistant United States Attorney ANDREW MALONEY at his office on February 3, 1969, from three to three forty-five in the afternoon. I had previously known MALONEY because he joined the United States Attorney's office when I had already been an Assistant for some time. No one else was present during our February 3 discussion.

3. At the beginning of our conference, I assured MALONEY that my law firm

was representing only JACOB FRIEDLAND and not MILTON SILVERMAN or his interests. That was absolutely true.

4. MALONEY informed me that it was his legal theory that JUDGE MURPHY's orders of June 24 and July 10, 1968 quashing FRIEDLAND's grand jury subpoena would be no bar to FRIEDLAND's trial testimony because, MALONEY asserted, FRIEDLAND had lied during the June 19, 1968 hearing on the motion to quash (prior to my representation of FRIEDLAND) and, further, had in fact given criminal advice to his clients, thus making it improper for them to claim the privilege.

5. MALONEY's argument, he told me, was that in specifically denying the existence of a report for Local 1614, FRIEDLAND had exposed himself to a charge of perjury. MALONEY suggested to me that he had the Local 1614 report, or would have it shortly through informants.

MALONEY told me that he wanted to trade a possible perjury indictment for FRIEDLAND's testimony. MALONEY added that, while he could "control" a perjury indictment, he could not control any disciplinary problems that FRIEDLAND might have.

6. I informed MALONEY that there was no chance that FRIEDLAND would testify before the grand jury, whereupon MALONEY agreed that he would not waste our time with that. MALONEY advised me that he did not want to go to trial if it could be avoided, because he did not want to have to reveal informants' identities. He asked me to use FRIEDLAND to put pressure on SILVERMAN to plead guilty. I advised MALONEY that, since I had no relationship with SILVERMAN, the most I could do would be to act as a conduit and see that the information was brought to FRIEDLAND's attention.

7. Thereafter, I was present as FRIEDLAND's attorney during certain portions of MILTON SILVERMAN's trial. Naturally, my sole interest was in protecting FRIEDLAND's rights -- by avoiding his testimony altogether if possible and, if not, by obtaining immunity from prosecution and preventing professional discipline. Clearly, it was not in FRIEDLAND's best interests that I reveal to anyone outside my law firm the prosecutor's belief that FRIEDLAND had previously lied under oath or the fact that MALONEY had agreed not to seek FRIEDLAND's perjury indictment if he testified at trial. Therefore, I told no one except my partners.

8. Ten years later, in 1979, DANIEL MARKEWICH, ESQ., MILTON SILVERMAN's new attorney, telephoned me and inquired whether I had any information indicating that either FRIEDLAND or I had at any time discussed with MALONEY either the content of FRIEDLAND's prospective testimony or the

possibility that either of two prospective witnesses would be called by the Government. Because I knew the good reputation of MARKEWICH's law firm, I agreed to get my FRIEDLAND file out of dead storage and see whether materials therein might refresh my recollection as to the issues which MARKEWICH had asked me about. When I reviewed the materials in the file, I answered MARKEWICH's questions in the negative, but also volunteered that I had refreshed my recollection from a contemporaneously made memorandum as to a conversation that I had had with MALONEY on February 3, 1969. After MARKEWICH satisfied me that no attorney-client privilege appertained and that it was for me to decide whether to attempt to invoke the work-product rule, I determined that no legitimate interest of FRIEDLAND's still required protection ten years after SILVERMAN's trial, and I then revealed to

MARKEWICH the content of my conversation with MALONEY in which he discussed FRIEDLAND's alleged prior perjury at a prior hearing in the very case in which the Government wanted to use FRIEDLAND as a witness.

9. Should this Court so require, I am willing to repeat and corroborate the contents of this affidavit under oath at such hearing as may be ordered. I have the memorandum of my conversation with MALONEY, dictated and dated only one day afterwards, which I shall produce at the hearing.

/s/ ROBERT E. SCHER
ROBERT E. SCHER

Sworn to before me this

day of October, 1979.

DANIEL MARKEWICH
NOTARY PUBLIC, STATE OF NEW YORK

Commission Expires March 30, 19__

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against- 68Cr.762
(ELP)

MILTON SILVERMAN,

Defendant.

- - - - - - - - - - - - - - - - - -x

AFFIDAVIT IN SUPPORT OF MOTION
FOR WRIT OF ERROR CORAM NOBIS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DANIEL MARKEWICH, being duly sworn, deposes and says:

1. I am a member of the firm of MARKEWICH ROSENHAUS MARKEWICH & FRIEDMAN, P.C., presently the attorneys for MILTON SILVERMAN. I have been a member of the Bar of this State since 1965, of the Bar of this Court since 1969, and of the Second Circuit Bar since 1973. I was an Assistant District Attorney in New York County from 1965 to 1969. I am a member of the

Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York. I make this affidavit in support of the defendant's motion for a writ of error coram nobis. The defendant was convicted before JUDGE PALMIERI and a jury in 1969, and that conviction was upheld by the Circuit Court in United States v. Silverman, 430 F.2d 106 (2d Cir. 1970) and 439 F.2d 1198 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971).

2. I was retained by the defendant early in 1978 to investigate the possibility of bringing a new-trial motion grounded in certain materials (annexed hereto as Exhibit "A") relating to the request for immunity for JACOB FRIEDLAND that JUDGE PALMIERI had inspected in camera in ruling on defendant's last prior motion but which defendant himself had obtained under the Freedom of Information Act only during the process of appeal from JUDGE PALMIERI's ruling. Shortly

after commencing investigation of the issues, I became ill with hepatitis and was incapacitated for several months. At last, in the fall of 1978, I was able to commence my perusal of the voluminous prior papers in this case, and to begin researching the law. Additionally, other requests were pending under the Freedom of Information Act, relating to MAX SANCHEZ' immunity papers (annexed hereto as Exhibit "B"), that made it seem advisable to wait before bringing a motion.

3. Finally, early in 1979, I had enough information to warrant my contacting ROBERT SCHER, and we then had the conversations that he describes in his affidavit. To my surprise -- and, I may say, delight, because I was instantly aware of the Brady v. Maryland, 373 U.S. 83 (1963), and Giles v. Maryland, 383 U.S. 66 (1967), implications -- I found that the information obtained from SCHER required

another full round of factual and legal research. I realized that this was MILTON SILVERMAN's best and last chance for post-judgment relief, and I wanted to make sure that it was done as carefully as possible in order to rebut any possible charge of "'Wolf, wolf!' once too often." For SILVERMAN had brought several prior motions for post-judgment relief, the last of which had been called "frivolous" by the Second Circuit. Silverman v. United States, 556 F.2d 655, 659 (2d Cir.), cert. denied, 434 U.S. 956 (1977). That was, of course, long before my involvement in this case and my interview with ROBERT SCHER. The instant motion is, to say the least, not frivolous but deadly serious and well-founded.

4. While rejecting defendant's allegations of prosecutorial misconduct in 1977, the Second Circuit had hastened to add:

> "We recognize the cardinal importance that no person should be convicted on

> the basis of perjury. We wholeheartedly support the rule that it is a denial of the due process guaranteed by the Fifth Amendment for a person to be convicted on the basis of testimony known to the Government to be perjurious."

In the instant case, it is at last provable that ANDREW MALONEY, whose conduct herein has already been criticized by the Second Circuit as "characterized by a degree of over-kill," deliberately, intentionally and wrongly withheld from the defense his knowledge and belief that JACOB FRIEDLAND had lied on a material and relevant issue on a prior hearing in the case (the minutes of which are annexed hereto as Exhibit "C") and that he had offered FRIEDLAND freedom from a perjury indictment in exchange for his trial testimony. Instead of fulfilling his legal and ethical responsibilities under Giglio v. United States, 405 U.S. 150, 153 (1972) and Napue v. Illinois, 360 U.S. 264, 269 (1959), to reveal this valuable

information, MALONEY actually took steps to hide it: (1) He told the Court in the presence of defense counsel that FRIEDLAND was a target for obstruction of justice, but said nothing about perjury; (2) he told the same thing, and made the same omissions, to the Attorney General in his immunity request for FRIEDLAND, perhaps because the Justice Department would not have been likely to grant immunity to a witness who had already lied under oath in a hearing on a material issue in the same case; (3) he was careful to ask FRIEDLAND no questions on direct examination at trial that would have required him to repeat his perjury. (Extracts from the trial minutes are annexed hereto as Exhibit "D.") Such was MALONEY's view of his responsibilities toward a defendant who, in his own words in the immunity request, "the Department has been investigating for some 10 years without success...this is the closest we have ever

come!" This misconduct by the prosecutor falls within the ambit of the latest Silverman decision and mandates reversal.

5. Unfortunately, after receiving the factual and legal information in support of this relief, I was unable to proceed immediately because I became deeply involved in other litigation that had pressing deadlines, including an emergency appeal, a client's disciplinary proceeding, a couple of major trials, several exacting pre-trial motions, and the completion of my own matrimonial litigation. Now, having returned from a summer vacation, I have prepared and am submitting this motion, which requests vacatur of the defendant's conviction and a new trial.

6. There can be no doubt that the trial testimony of FRIEDLAND -- the Government's last, and only rebuttal, witness -- was a key to the conviction of the defendant on all counts. The Second Circuit held,

United States v. Silverman, supra, 430 F.2d at 118, that FRIEDLAND's testimony was directly probative of counts 10, 11, 12 and 13, as well as 18. (A copy of the indictment is annexed hereto as Exhibit "E.") The tenth through thirteenth counts charged embezzlements, and indeed MALONEY's immunity request for FRIEDLAND was grounded, as it had to be, in the contention that his testimony was relevant to "a violation of 29 U.S.C. Section 501(c)" -- embezzlement. See Matter of Vericker, 446 F.2d 244 (2d Cir. 1971). The ninth and fourteenth counts of the indictment also charged embezzlements, and the fifteenth count charged false reporting, so it would be naive to contend that FRIEDLAND's testimony was not persuasive to the jury upon these counts as well. Indeed, the Court specifically charged the jury at page 1164 of the trial transcript that

> "if you find that these two pages have been fabricated, after a subpoena was served upon the union for their production, it would be a circumstance for you to consider in the light of all the evidence in the case in determining the defendant's guilt or innocence."

This instruction bore on no particular count or counts, but rather on all of the charges. Earlier, at page 1160, the Court had charged that there was "a sharp factual controversy" as to whether pages of the minute books "were fabricated for the purpose of providing the defendant with a false defense in this trial." This charge too told the jurors that if they believed that FRIEDLAND's testimony demonstrated fabrication of evidence, they were free to reject the entire defense as false. And at page 27 of the transcript of argument of a new-trial motion before JUDGE PALMIERI on December 12, 1969 (annexed hereto as Exhibit "F"), he suggested that in fact the jury had probably found from the fabrication of evidence that the defendant had perjured himself at trial:

> "The jury in this case could have concluded and would have been quite justified in concluding that evidence had been fabricated for the trial. They would have been justified in concluding that the defendant perjured himself in his testimony, and so these affidavits come before me with a bitter taste, not only of conviction, but of specific findings that the jury probably made that were very seriously adverse to the defendant's position."

Under the circumstances, it is realistically impossible to conclude that FRIEDLAND's testimony -- which, if believed, directly bore on the defendant's guilt of counts 10, 11, 12, 13 and 18, demonstrated his guilt of embezzlement (also charged in count 14) and false record-keeping (also charged in count 15), and showed that a false defense had been created -- did not constitute the key testimony against him. FRIEDLAND's testimony was highly material.

7. The only count that could arguably stand alone is count 14, involving the air conditioner. But, on a prior motion in which SILVERMAN alleged that since he had

been wrongly convicted of count 14 the other counts should also be set aside, Assistant United States Attorney JACK KAPLAN conceded in an affidavit filed December 8, 1969 (annexed hereto as Exhibit "G") that count 14 standing alone was the weakest charge in the indictment:

> "Count 14 was of no great significance by comparison with the other counts. The fact that the jury asked for a reading of some of the Count 14 testimony only shows that the jury knew what it was doing, since the proof of Count 14 was simply a case of one man's word (CHLYSTUN's) against another's (SILVERMAN's)."

See also, pages 1037-1038 of the Court's charge at trial and Silverman v. United States, supra, 556 F.2d at 657, where the Second Circuit alluded to the "extensive conflicting evidence" as to the fourteenth count. Not only did the prior motion demonstrate that SILVERMAN would probably not have been convicted, or at least probably would have been granted a new trial even without proof of

prosecutorial suppression, had count 14 stood alone. More importantly for the instant motion, even JACK KAPLAN conceded that the jury felt that it must examine count 14 more carefully than the other charges, because it was only CHLYSTUN's word against SILVERMAN's. JUDGE PALMIERI himself observed that the jurors probably concluded that SILVERMAN had perjured himself at the trial because, based largely on FRIEDLAND's testimony, they concluded that the defense had been fabricated. Such a finding on the jury's part would bear, under these circumstances, at least as strongly on count 14 as on any of the other counts. Of course, count 14, like counts 10, 11, 12 and 13, was an embezzlement from the Unions, and FRIEDLAND's testimony stood for the proposition that SILVERMAN had directed the falsification of records (counts 18 and 15) to cover up embezzlements (counts

10, 11, 12, 13 and 14). Indeed JUDGE PALMIERI himself in a March 21, 1972 opinion (annexed hereto as Exhibit "H") held that FRIEDLAND's testimony was generally "clearly admissible" on the issue of SILVERMAN's "intent." Certainly, a finding by the jury that FRIEDLAND himself had previously committed perjury on a material issue at a hearing in the very case on trial might reasonably have led to a different verdict on all counts.

8. Five factual affidavits are submitted herewith. From these sworn statements, it would appear that SILVERMAN knew a report had been submitted to Local 1614 but not that FRIEDLAND had testified that no such report had been made; GALLOP (and presumably ROGGE) knew that FRIEDLAND had testified that no Local 1614 report had been made but did not know that there was in fact such a report; SHIVITZ himself represented that no report had been made,

and believed FRIEDLAND's testimony to be truthful; SANCHEZ knew that FRIEDLAND had falsely testified that no report had been made but shared that fact with no one except perhaps his own attorney, now deceased; SCHER knew that MALONEY contended that FRIEDLAND had committed perjury at a hearing in denying the existence of the Local 1614 report, but SCHER was bound to withhold that information to protect his client; MALONEY knew and believed that FRIEDLAND had committed perjury on a material issue at a prior hearing in the same case, and offered freedom from indictment therefor, yet took no steps to inform defense counsel or the Court. As the accompanying memorandum of law shows, this deliberate prosecutorial suppression mandates vacatur of SILVERMAN's conviction and a new trial.

9. It has been noted hereinabove that the majority in the Second Circuit

criticized MALONEY for "over-kill" in connection with this very case, supra, 430 F.2d at 128. It could not be more evident that MALONEY was out to "get" SILVERMAN; the immunity request itself so demonstrates. SCHER's affidavit brings to light for the first time that MALONEY was guilty of deliberate suppression. Indeed, he not only sat idly by but even misled the Court and defense counsel. At page 634 of the trial transcript, MALONEY specifically told the Court that FRIEDLAND had been a target for "a possible obstruction of justice," and that he had advised FRIEDLAND of that "through MR. SCHER." That alleged obstruction concerned "the changing of these documents." Nothing was said about perjury, or about discussion of a perjury indictment with SCHER, or about the existence of the Local 1614 report, or about a "deal." MALONEY had a duty to speak; SCHER had a duty not to speak. MALONEY

effectively misled defense counsel and the Court, and later even his superiors in the Justice Department, by failing to bring FRIEDLAND's prior perjury and the threat of indictment therefor to light at a time when it could be made use of on cross-examination.

10. There can be no question in this case that the alleged obstruction of justice was not the same as the alleged perjury, and that MALONEY's revelation of the one crime was not a revelation of the other. If page 634 of the trial transcript is not sufficiently clear as to what MALONEY thought constituted obstruction of justice, page 1096 of the sentencing minutes (annexed hereto as Exhibit "I") further demonstrates what MALONEY meant by that term:

> "As your Honor well knows from the proof in this case, Count 18 is quite another story. It encompasses a lot of things, keeping false books and records, but primarily the minute books the proof has shown was, by virtue of MR. FRIEDLAND's being granted

> immunity and the laboratory analysis, that that is nothing more or less than an obstruction of justice during the course of the investigation in this case, and presumably that was at the behest of MR. SILVERMAN."

This, of course, like the rest of MALONEY's statements to defense counsel and the Court, gave no hint that the prosecutor believed and contended that FRIEDLAND had lied under oath earlier in the case. Moreover, defense counsel's reaction must have paralleled the Court's, at page 639: MALONEY thought <u>everyone</u> was guilty of obstructing his investigation!

11. Indeed, MALONEY's solution to the problem posed by calling to the stand at trial a witness who he knew had previously lied in the same proceeding was ingenious. Under then 18 U.S.C. §2514 FRIEDLAND received transactional immunity, which apparently ran even to his prior perjury, so long as he did not repeat it at the trial.

Allegedly to protect FRIEDLAND's rights, MALONEY agreed at page 647 of the trial transcript to severely restrict the scope of his examination of FRIEDLAND. As the Court phrased it at page 649:

> "MR. MALONEY has agreed to go no further than to get MR. FRIEDLAND's recollection of the condition of these minute books at the time he saw them."

Then, at pages 977-982 and 991, MALONEY questioned FRIEDLAND only about his examination of the books and records of Local 810 and his report to that Local. Purposely, so that FRIEDLAND would not repeat his prior perjury and thus unquestionably obligate MALONEY to disclose it, MALONEY asked FRIEDLAND no questions about Local 1614. Therefore, MALONEY may have disingenuously reasoned, he was under no legal or ethical obligation to reveal FRIEDLAND's prior perjury to defense counsel or the Court. But, regardless of MALONEY's actual motivation for so doing,

the fact remains that he knew of, and wilfully failed to reveal, FRIEDLAND's prior perjury.

12. As the accompanying memorandum reveals, MALONEY's reasoning, even as most charitably construed, was plainly wrong and constituted sharp practice. The failure to reveal a key witness' past perjury earlier in the same case mandates reversal, even when the perjury relates only to the witness' credibility, are in any way relevant to the case. There can be no question that FRIEDLAND was a, perhaps the, key witness. There can be no question that MALONEY knew FRIEDLAND had lied; indeed, MALONEY himself set up the perjury, by insisting at page 8 of the hearing minutes that FRIEDLAND deny under oath the existence of the report to Local 1614. There can be no question that MALONEY wilfully failed to reveal the perjury to defense counsel and the Court, and in fact misled all parties.

13. As the accompanying memorandum of law indicates, MALONEY's failure to reveal FRIEDLAND's prior perjury on a "material matter," which involved an element of the crimes charged and otherwise bore on the circumstances of the case, mandates a reversal. United States v. Rosner, 516 F.2d 269 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976). There can be no doubt that the perjury was on a "material matter"; otherwise, it would have given MALONEY no ground for seeking an indictment pursuant to then 18 U.S.C. §1621, or for "controlling" one. United States v. Rapoport, 545 F.2d 802 (2d Cir. 1976), cert. denied, 430 U. S. 931 (1977). There can be no doubt that the existence or not of a report to Local 1614, as well as the report to Local 810, would have been material to the case against SILVERMAN. First, even as corrected at page 1192 of the trial transcript pursuant to ROGGE's exception at page 1182, the Court's charge at page 1162 would logically have been taken by the jury to permit them

to conclude from FRIEDLAND's testimony that both Locals' minute books had been changed, as the F.B.I. expert had suggested. Secondly, the Court charged at page 1160 that proof of fabrication might be taken as proof of a false defense, and at page 1164 that proof of fabrication was a "circumstance" that bore on "the defendant's guilt or innocence" as to all counts. Thirdly, MALONEY himself argued to the jury at page 1080 that, "In considering each count of this indictment you must consider the false records in this case...." Fourthly, at page 1004 the Court itself emphasized that the Local 810 report was "directly relevant to the proof as to whether the two pages of the minute books in 1965 [Local 810 and Local 1614] were fabricated"; MALONEY made the same argument at pages 1101-1103. Fifthly, the indictment itself in counts 1-13 and 18 made no distinction between Locals 810 and 1614, and count 14 concerned the combined welfare fund of both

Locals; therefore, it was only reasonable for the jury to have concluded that proof of alteration of Local 810's books also demonstrated alteration of Local 1614's, particularly since the same typewriter was allegedly involved in both.

14. FRIEDLAND's perjury on a matter that was "material" to the prior hearing was "relevant" and "material" at trial as bearing on the key witness' credibility by showing his "propensity to disregard the obligation of an oath." United States v. Provoo, 215 F.2d 531, 537 (2d Cir. 1954), and United States v. Tomaiolo, 249 F.2d 683, 689 (2d Cir. 1957), in effect at the time of the instant trial; Fed. R. Evidence 401, 404 (a)(3) and 608(b), now in effect. Evidence of the prior perjury would have a "tendency to make the existence of any fact that is of consequence to the determination of the action [i.e., those facts testified to by FRIEDLAND at trial] more probable or less probable than it would be

without the evidence." Fed. R. Evidence 401. MALONEY was therefore under an obligation to reveal that perjury. Napue v. Illinois, supra, at 269-270; Taylor v. Lombard, No. 79-2072, slip op. at 35 (2d Cir. Oct. 1, 1979).

15. Under these circumstances, there can be no doubt that, pursuant to United States v. Keogh, 391 F. 2d 138, 142 (2d Cir. 1968), the defendant is entitled "to an evidentiary hearing on his position" and, pursuant to Napue v. Illinois, supra, Taylor v. Lombard, supra, and other cases from this Circuit, to a new trial on the ground that evidence of FRIEDLAND's perjury on a material issue during a prior hearing in the very case on trial "could...in any reasonable likelihood have affected the judgment of the jury..." and "could well have resulted in a different verdict."

/s/ Daniel Markewich
DANIEL MARKEWICH

Sworn to before me this
31st day of October, 1979.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against- 68Cr.762
(ELP)

MILTON SILVERMAN,

Defendant.

- - - - - - - - - - - - - - - - -x

AFFIDAVIT IN SUPPORT OF MOTION
FOR WRIT OF ERROR CORAM NOBIS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DAVID I. SHIVITZ, being duly sworn, deposes and says:

1. I am senior partner in the law firm of HALPERIN SHIVITZ, SCHOLER SCHNEIDER & EISENBERG. I have been a member of the Bar for almost fifty years.

2. During the years 1968 and 1969, my predecessor law firm acted as general counsel to Local 810, International Brotherhood of Teamsters, and Local 1614, International Brotherhood of Electrical Workers. In 1968

grand jury subpoenas were served on both Locals calling for production of the "report of examination of the financial records of [that Local], submitted by JACOB FRIEDLAND, as referred in the billing dated May 17, 1967." Copies of these subpoenas are annexed as Exhibits "K" and "L." Initially no such reports could be located, although I did move to quash the subpoenas on the ground of attorney-client privilege. Thereafter, by letter, FRIEDLAND advised me and the Assistant United States Attorney that he had located a copy of the Local 810 report. A hearing was then ordered before JUDGE MURPHY.

3. Before receiving a copy of the Local 810 report from FRIEDLAND, I had never seen such a report either to Local 810 or to Local 1614. It is to be noted that, contrary to the Local 1614 subpoena, FRIEDLAND's May 17, 1967 billing to "Local 1616" [sic] does not refer to any report to that Local;

only the billing to Local 810 makes such a reference. Copies of these bills are annexed as Exhibits "M" and "N." Accordingly, and after speaking with FRIEDLAND prior to his testimony, I advised JUDGE MURPHY and MR. MALONEY exactly what the billings indicated and what FRIEDLAND had told me: that he had rendered a report to Local 810 but none to Local 1614. FRIEDLAND thereafter testified to the same effect under oath.

4. I never learned that such a report had been rendered to Local 1614, nor did I discuss this question with anybody. I learned of MR. SCHER's conference with MALONEY only on January 23, 1979, during a conference with DANIEL MARKEWICH, ESQ.

/s/ DAVID I. SHIVITZ
DAVID I. SHIVITZ

Sworn to before me this
31st day of October, 1979.

CATHERINE A. GAFFNEY
Notary Public, State of New York
No. 31-4612389
Qualified in New York County
Commission Expires March 30, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

-against-

MILTON SILVERMAN, 68Cr.762 (ELP)

Defendant

----------x

AFFIDAVIT IN SUPPORT OF MOTION FOR WRIT OF ERROR CORAM NOBIS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

KALMAN V. GALLOP, being duly sworn, deposes and says:

1. Along with O. JOHN ROGGE, ESQ., I was counsel to MILTON SILVERMAN at his 1969 trial before this Court. I was present in the courtroom throughout the trial as ROGGE's assistant, although I personally conducted some of the examination of witnesses.

2. On June 19, 1968, I was present as an interested observer before JUDGE

MURPHY during a hearing at which JACOB FRIEDLAND and MAX SANCHEZ testified. The other attorneys present were ANDREW MALONEY, the Assistant United States Attorney, and DAVID I. SHIVITZ, ESQ., attorney for Local 810 and Local 1614. Since the minutes of the hearing reveal that I was present thereat, I must have heard the testimony of both witnesses as well as the colloquy, although I have no present recollection of what transpired at the hearing. I therefore obviously must have been aware of the fact that both FRIEDLAND and SHIVITZ denied the existence of any report by FRIEDLAND to Local 1614.

3. I have no recollection of having shown SILVERMAN the minutes of the hearing. Nor do I recall ever discussing with SILVERMAN the question of whether or not FRIEDLAND had made a report to Local 1614. I would have had no reason to question the representation made by MR. SHAVITZ that no

such report existed.

4. I do remember to my surprise JOHN ROGGE, ESQ. on the very day of MR. FRIEDLAND'S testimony telling me that I was to cross-examine MR. FRIEDLAND. I had no notion that FRIEDLAND had allegedly committed perjury at the June 19th hearing nor did I have any knowledge of any alleged conversation between MALONEY and SCHER as set forth in the affidavit of ROBERT E. SCHER. I am sure that had I been aware of the facts as set forth in the SCHER affidavit I would have sought to demonstrate to the jury the pressure brought upon FRIEDLAND, and that he should not now be believed in that he had previously lied under oath.

5. I have no doubt that these facts may have influenced the jury in its deliberation, and if the jury had chosen not to believe FRIEDLAND the outcome of the entire trial might have been different.

6. In giving this affidavit I wish to make clear that I have no personal knowledge as to whether or not FRIEDLAND did in fact commit perjury on June 19, 1968.

/s/ KALMAN V. GALLOP
KALMAN V. GALLOP

Sworn to before me this 18th
day of September, 1979

WILLIAM M. BRODSKY
Notary Public, State of New York
No. 24-02BR4652673
Qualified in Kings County
Commission Expires March 30, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against-

MILTON SILVERMAN,

68Cr.762
(ELP)

Defendant.

- - - - - - - - - - - - - - - - - -x

AFFIDAVIT IN SUPPORT OF MOTION
FOR WRIT OF ERROR CORAM NOBIS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MAX G. SANCHEZ, being duly sworn, deposes and says:

1. I am an officer of Local 810, I.B.T. In 1968 I was a vice president of Local 810 and president of Local 1614, I.B.E.W.

2. Sometime in May of 1968, I was called before the federal grand jury and asked whether I was familiar with a report rendered by JACOB FRIEDLAND to Local 810. I stated that I was, and indicated that I

had seen copies of such a report but could not now locate a copy thereof. I was not asked about any report rendered by FRIEDLAND to Local 1614. Of course I knew that such a report had been made to Local 1614, but I was not volunteering information to a prosecutor who had repeatedly harassed me by calling me before the grand jury on five separate occasions, threatened me with further grand jury appearances, and branded me a "target" of his investigation. (Recently, I have learned through the Freedom of Information Act that, eight months before my May, 1968 testimony as a "custodian" of records, the prosecutor had received authorization to confer immunity upon me but had never done so, apparently preferring to "neutralize" me into an enforced silence that permitted me to talk freely only with my own attorney, now deceased.)

3. Perhaps a month after my grand jury testimony, I was again required to

testify as a "custodian" at a hearing before JUDGE MURPHY. I have recently had the first opportunity to review the minutes of this hearing, and I am absolutely certain that I was outside of the courtroom during DAVID SHIVITZ' remarks to the Court; it was only upon reading these minutes that I first became aware that SHIVITZ had told JUDGE MURPHY that no report had been made by FRIEDLAND to Local 1614. If I had known that SHIVITZ had so stated, I doubt that I would have publicly corrected him but I might have privately advised him that his statement had been unintentionally inaccurate. But, I repeat, until recently I was not aware of what SHIVITZ told JUDGE MURPHY, because I was not there.

4. When the courtroom door was opened and FRIEDLAND was called in to testify, I followed him in and overheard his testimony. I heard him falsely testify that he had rendered no report to Local 1614, and I knew

that the testimony was false. On the other hand, I could not for the life of me comprehend why this was important or what motive FRIEDLAND had for falsifying, since, as far as I knew from my grand jury appearance, MALONEY's interest was solely in the report given to Local 810.

5. I was the next witness, answered only the questions asked, which concerned only the report to Local 810 and my grand jury testimony, and volunteered nothing. Afterwards, I did not discuss FRIEDLAND's testimony with SHIVITZ, for, frankly, we never got along very well as I felt he lacked the "common touch." I am equally sure that I did not discuss FRIEDLAND's hearing testimony with MILTON SILVERMAN, for I was under strict instructions from my lawyer, JACQUES SCHIFFER -- SILVERMAN having already been indicted and further indictments of all of us "in the wind" -- to talk only to my attorney.

6. I do not recollect whether I did or did not discuss FRIEDLAND's testimony with SCHIFFER. I was in the habit of giving him a written digest of the questions asked of me during my repeated grand jury appearances, but I was never asked to render a report as to anyone else's testimony. Therefore, it may very well be that I did not discuss FRIEDLAND's testimony even with SCHIFFER. In any event, I am absolutely sure that I did not discuss it with anyone else prior to SILVERMAN's conviction or, to my recollection, thereafter.

/s/ MAX G. SANCHEZ
MAX G. SANCHEZ

Sworn to before me this
25th day of October, 1979.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against- 68Cr.762
(ELP)

MILTON SILVERMAN,

Defendant.
- - - - - - - - - - - - - - - - - -x

AFFIDAVIT IN SUPPORT OF MOTION
FOR WRIT OF ERROR CORAM NOBIS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MILTON SILVERMAN, being duly sworn, deposes and says:

1. I was the defendant in the above-captioned case. I make this affidavit in support of my within motion for a writ of error coram nobis vacating my conviction and granting me a new trial of my 1969 case.

2. I knew that JACOB FRIEDLAND had rendered a report on the finances of Local 1614. I was not present at the hearing

where FRIEDLAND gave false testimony in which he denied having given such a report to Local 1614. The first time I saw the minutes of that hearing was sometime after my conviction, in the course of one of my post-trial motions. By then it was too late to do anything about FRIEDLAND's perjury, in view of the fact that I had no evidence that the Government had known that FRIEDLAND's testimony at the hearing had been false.

3. I feel certain that my own attorneys did not know that FRIEDLAND's testimony at the hearing had been false. They never discussed the hearing minutes with me, nor did they show me a copy. Obviously, DAVID SHIVITZ thought that FRIEDLAND was truthful in denying any report to Local 1614; therefore, he obviously had not informed my attorneys to the contrary. As for myself, I did not even know that the existence of the Local 1614 report was at issue; I thought the only question was whether it was legally privileged and

that the Government had ultimately made a tactical decision to use only the Local 810 report so as not to "gild the lily." I state unequivocally that it was not until sometime after my conviction that I first learned that FRIEDLAND had testified falsely. At no time prior thereto did I discuss FRIEDLAND's false testimony with MAX SANCHEZ, SHIVITZ, my attorneys, FRIEDLAND, SCHIFFER or anyone else; for I did not know about it.

4. Nor did I discuss with SHIVITZ or my attorneys the fact that a Local 1614 report did in fact exist. I regret that no corroborating affidavit from O. JOHN ROGGE himself is included herewith, but he previously testified at the trial of a fee dispute between his former law firm and myself "that it was not my habit to make affidavits for clients; that my clients made their own affidavits...", a sentiment which he repeated on several occasions throughout the

transcript of that trial. Therefore, I can only state that I do not believe that ROGGE was or could have been aware either that a Local 1614 report did exist, or that FRIEDLAND's denial of its existence had been perjurious, or that ROBERT SCHER had had the kind of conversation with MR. MALONEY that SCHER relates in his own affidavit. The statements of all of the other affiants lend support to my contentions.

5. There is also inferential support in the testimony of the fee-dispute trial for the proposition that ROGGE did not ask me whether or not there had been a report to Local 1614. At that trial, ROGGE testified that it had been my responsibility to advise my lawyer whether I had an alibi as to the air-conditioner count. "It's not counsel's job to ask him whether he has an alibi." Similarly, ROGGE presumably believed it was my responsibility to come forward with the information that a report

had been rendered to Local 1614, when in fact it would only have been reasonable for him, having the minutes of FRIEDLAND's testimony, to have taken the initiative and asked me if FRIEDLAND was truthful in denying the existence of the Local 1614 report. This ROGGE did not do and, since I did not appreciate the significance of the existence or not of that report when the Local 810 report had been produced and was available, I did not volunteer the information which in fact would have enabled ROGGE and GALLOP to know that FRIEDLAND had lied. It should, however, be said in ROGGE's defense that, like GALLOP, he had every reason to have believed FRIEDLAND since SHIVITZ' remarks fully supported FRIEDLAND's own testimony.

6. I am certain that none of my attorneys prior to MR. MARKEWICH had learned from MR. SCHER or anyone else of his conversation with MALONEY a month prior to trial in which MALONEY demonstrated that he

knew that FRIEDLAND had lied under oath on a material issue in my case and was offering him freedom from a perjury indictment in exchange for his testimony. Nor did MALONEY disclose this before or during trial, as he should have. In fact, MALONEY affirmatively misled us at trial by stating that FRIEDLAND was under investigation for obstruction of justice, when he had in fact already been threatened, through his attorney, with a perjury indictment for lies uttered under oath in the same case on the same issues. As for myself, I knew nothing of any of this until MR. MARKEWICH informed me of his conversation with SCHER.

7. I respectfully request a new trial. I have long since paid my fine, served my prison term, and become eligible for Union office once more. I have been in no further trouble with the law. These facts notwithstanding, Local 810's organizers are greeted year after year with anti-Union propaganda

from employers, such as the following from June, 1979: "MILTON SILVERMAN, the former president of the Local, spent time in Federal prison for embezzlement of union funds." [Italics as in original.] I pray that this Court will understand that I have no motive to falsify and thus to invite Government reprisals, but rather that my sole and legitimate purpose in bringing this motion is to clear my name and that of Local 810.

8. Coincidentally, The New York Times for October 23, 1979, p. B2, cols. 1-2 (annexed hereto as Exhibit "J"), reveals that JACOB FRIEDLAND has himself at last been indicted, along with his son, for a Union kickback scheme dating back to 1975 and 1976 -- the very period during which JUDGE PALMIERI, without knowledge of FRIEDLAND's misconduct, was reaffirming the integrity of his trial testimony in two opinions. Interestingly, one of the counts of FRIEDLAND's indictment is for obstruction of justice by trying to influence a grand jury

witness to lie! Although this is presently only an accusation, it tends to demonstrate that FRIEDLAND was in fact fully capable of perjury as well as obstruction of justice, both with no aid from me. It is respectfully submitted that, under these circumstances, it would be appropriate for this Court, at the hearing on this motion, not only to consider the new matter raised by this motion but also to reconsider the questions raised previously as to whether FRIEDLAND himself, and on his own initiative, was responsible for the changes in the minutes and, additionally, whether influence was put on FRIEDLAND to help "get" me in order to protect FRIEDLAND's son, who was also threatened with indictment at the time of my trial.

/s/ MILTON SILVERMAN
MILTON SILVERMAN

Sworn to before me this
29th day of October, 1979.

LEAH SCHERER
Notary Public, State of New York
No. 41-4619390
Qualified in Queens County
Commission Expires March 30, 1979.

UNITED STATES DISTRICT COURT
Southern District of New York
New York, N. Y. 10007

Chambers of
EDMUND L. PALMIERI
District Judge

March 17, 1980

Daniel Markewich, Esq.
Markewich, Rosenhaus, Markewich
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Empire State Building
350 Fifth Avenue
New York, N.Y. 10001

Alan Levine, Esq.
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Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007

Re: United States v. Silverman

Dear Sirs:

I refer to the letter of Mr. Daniel Markewich dated March 12, 1980, regarding the court's letter to counsel dated March 5, 1980, in which the court denied permission to file the supplemental affidavit of Mr. Scher. The court adheres to the position stated in that letter.

No affidavit of Mr. Maloney was submitted by the Government in these proceedings. However, there is on record an affidavit of Mr. Maloney, submitted to this court during the 1976 proceedings. The court was not advised at the time of

argument that this affidavit existed and did not recollect it until after the argument.

The court cannot discern any appropriate basis for the submission of additional papers at this time and denies Mr. Markewich's request in all respects.

Very truly yours,

/s/ Edmund L. Palmieri

Edmund L. Palmieri
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -X

MILTON SILVERMAN, :

Petitioner : AFFIDAVIT IN OPPOSITION TO MOTION

-v- :

75 Civ. 4989

UNITED STATES OF AMERICA :

Defendant. :

- - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

ANDREW MALONEY, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the bar of this Court and am a partner in the law firm of Maloney, Viviani and Higgins, 1290 Avenue of the Americas, New York, New York.

2. I was an Assistant United States Attorney in the Southern District of New York from January, 1962 through March, 1972 and was Regional Director of the

Department of Justice, ODALE from March, 1972 through September, 1974.

3. While an Assistant United States Attorney I was in charge of the prosecution of United States of America v. Milton Silverman, 68 Cr. 762 and am fully familiar with the matters herein.

4. As Your Honor might recall from the atmosphere of the trial, most of the witnesses called by the government were under the domination and control of the defendant Milton Silverman.

5. This was evidenced by the fact that all Teamster employees of Local 810 had to first be given immunity before testifying in the grand jury or at trial.

6. Indeed, it was the government's strategy in this case to subpoena a number of the aforesaid employees for each day of trial without the customary and normal pretrial interview and order of witnesses in order to protect the integrity of the fact

finding process and to avoid undue coercion on the union's part of any of these persons.

7. Thus, all of the union's employees subpoenaed for trial were uniquely available to the defendant Milton Silverman and under his domination and control.

8. With respect to Jacob Friedland, Your Honor will recall, he was also uniquely available to the defendant Milton Silverman having been retained by the union during the course of the grand jury investigation. Furthermore, the government had to request the Court to grant immunity to Mr. Friedland in order to secure any testimony concerning the alteration of union records. Once that immunity was granted, the government did not know what in fact his testimony would be.

9. It is clear from the proceedings in this case that at some time after service of the grand jury subpoena for Local 810 records, but prior to the

production pursuant to that subpoena, Mr. Friedland was retained by the union to examine said subpoenaed records. Similarly, it is clear that during said time a portion of those records were altered. The specific change in those records i.e., the authorization of $2,000 loan, benefited no one but the defendant Milton Silverman.

10. It was the government's position at the trial and is the government's position at this time that to the extent Mr. Friedland's testimony on this issue was less than candid, if at all, it benefited only the defendant Milton Silverman.

WHEREFORE, for all of the foregoing reasons and those set forth in the accompanying Memorandum of Law, the motion should be denied.

_____
ANDREW MALONEY

Sworn to before me this

day of January, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against-

MILTON SILVERMAN,

Defendant.

SUPPLEMENTAL AFFIDAVIT

68Cr.762 (ELP)

- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT E. SCHER, being duly sworn, deposes and says:

1. I make this supplemental affidavit at the request of DANIEL MARKEWICH, ESQ., to respond to certain points which MR. MARKEWICH advised me were raised at the oral argument of this motion before JUDGE PALMIERI on February 27, 1980.

2. The conference which I had with ANDREW MALONEY on February 3, 1969, was arranged at my request by appointment, and was not a casual meeting or encounter. In my professional opinion, based on my experience, it was in no way comparable to a casual

hallway conversation.

3. I cannot look into the workings of MR. MALONEY's mind, but I can tell this Court that it was and remains my distinct impression, conviction and belief that, in talking with me, MR. MALONEY was expressing more than a suspicion that MR. FRIEDLAND had committed perjury at the 1968 hearing. From the words that MR. MALONEY used, I am certain that he was telling me that he knew that MR. FRIEDLAND had lied under oath and that he was in possession of, or was about to be in possession of, hard evidentiary proof, by way of informants and/or documents, that MR. FRIEDLAND had committed perjury.

4. From my experience as an Assistant United States Attorney in the Southern District, and as a criminal defense attorney, I am certain that MR. MALONEY would not have offered to "trade" or to "control" a possible perjury indictment if he had had merely a suspicion of MR. FRIEDLAND's misconduct. As

far as I was concerned, and I am sure as far as MR. MALONEY was concerned, our conference was a serious negotiating session involving his best efforts to secure MR. FRIEDLAND's cooperation in exchange for the promise not to bring a perjury prosecution against him.

5. As for myself, I took MR. MALONEY's words, tone and threats so seriously that not only did I convey them to MR. FRIEDLAND; additionally, I made a full and complete memorandum of the conversation, which I would not have done in the case of anything like a casual hallway encounter or the mere expression of a prosecutor's opinion or suspicion.

6. As the memorandum shows, on February 4, 1969, even after I advised MR. MALONEY that MR. FRIEDLAND would avail himself of the attorney-client and Fifth Amendment privileges, MR. MALONEY told me that he expected to call MR. FRIEDLAND as a Government witness at trial and would let me know the exact date when MR.

FRIEDLAND's testimony would be required.

/s/ ROBERT E. SCHER
ROBERT E. SCHER

Sworn to before me this
29th day of February, 1980.

FED. R. EV. 404(a)(3):

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

FED. R. EV. 608 (b):

Evidence of Character and Conduct of Witness

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness

or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.